U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13137100

Date: SEP. 21, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established eligibility for EB-2 classification and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that he is eligible as individual of exceptional ability and for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

> who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
>
> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition to the definition of "advanced degree" provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

To demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an exceptional ability individual.

A. Member of the Professions Holding an Advanced Degree

In order to show that an individual holds an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

At initial filing, the Petitioner claimed that he possessed a foreign equivalent of a United States baccalaureate degree, along with five years of progressive post-baccalaureate experience in the specialty. The Director indicated in the request for evidence (RFE) that the presented evidence did not demonstrate the Petitioner's possession of an advanced degree. In response, the Petitioner did not address the Director's findings or submit additional evidence regarding this issue. In the decision denying the petition, the Director repeated his conclusions and determined that the Petitioner did not qualify as a member of professions holding an advanced degree.

On appeal, the Petitioner does not contest the Director's decision concerning this matter. Therefore, we deem this issue to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009); *see also Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived).

B. Exceptional Ability

Because he has not established that he qualifies as a member of the professions holding an advanced degree, the Petitioner must first meet at least three of the regulatory criteria for classification as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). In denying the petition, the Director determined the Petitioner fulfilled the following three regulatory criteria: official academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A), ten years of full-time experience at 8 C.F.R. § 204.5(k)(3)(ii)(B), and membership in professional associations at 8 C.F.R. § 204.5(k)(3)(ii)(E). Despite satisfying three criteria, the Director concluded that the Petitioner did not demonstrate that he possessed a degree of expertise significantly above that ordinarily encountered.

After reviewing the record, we agree with the Director's decision relating to 8 C.F.R. § 204.5(k)(3)(ii)(A) and (B). However, for the reasons discussed below, we do not concur with the Director regarding 8 C.F.R. § 204.5(k)(3)(ii)(E), and the record does not show that the Petitioner meets any additional regulatory criteria.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

The Petitioner did not claim eligibility for this criterion at either initial filing or in response to the Director's RFE. Accordingly, the Petitioner did not demonstrate that he satisfies this criterion.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D).

At initial filing, the Petitioner asserted the submission of a "[l]etter from Employer demonstrating [his] high salary (see Expert evaluation of salary in Exhibit below)." The Petitioner, however, did not identify the "Expert evaluation of salary" to which he referenced, nor is it shown in the "Exhibit below." The record does contain a letter from [redacted], president of [redacted] who indicated that the Petitioner "has been working with [redacted] as our Software Engineering Specialist" and "[f]or his excellent work, he is being compensated $65,000.00 per year." In addition, the record includes two letters from [redacted] that discussed his roles and employment but make no mention of his salary. The Petitioner also provided a letter from [redacted]

[redacted], adjunct professor at the University of [redacted], who referenced [redacted]'s letter and opined that "it makes sense to me that [the Petitioner] would be well-compensated for his exceptional services," and "[t]he trust that the company has put in [the Petitioner] is evident based on the remuneration he has been awarded for his exceptional service."

In response to the Director's RFE, the Petitioner did not further claim eligibility for this criterion. However, as evidence of his employment, he submitted copies of his paystubs from [redacted] and income tax documentation from [redacted]

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires "[e]vidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability."[4] Although the record contains evidence that he earned salaries from [redacted] and [redacted] the Petitioner did not demonstrate the significance of such salaries. Moreover, while [redacted] offered his opinion, he did not elaborate and sufficiently explain how the Petitioner's salary reflects exceptional ability besides repeating the language of the regulation. Repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). In addition, the Petitioner did not provide, for example, comparative occupational salary information showing that his salary rises to the level of exceptional ability.

For the reasons discussed above, the Petitioner did not establish that he commanded a salary commensurate with exceptional ability.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Director determined that the Petitioner met this criterion based on his membership with Agile Alliance. Because the record does not support the regulatory requirements, we will withdraw the Director's decision for this criterion.

At initial filing, the Petitioner did not claim eligibility for this criterion. In response to the Director's RFE, the Petitioner indicated his membership and stated that "Agile Alliance is a global nonprofit member organization dedicated to promoting the concepts of Agile Software Development." The Petitioner also submitted photographs depicting attendance at an Agile Alliance event and screenshots from agilealliance.org showing his membership status and background information about the organization. Specifically, Agile Alliance describes itself as "a nonprofit member organization dedicated to promoting the concepts of Agile Software Development as outlined in the Agile Manifesto." Moreover, "Agile is a mindset informed by the values contained in the Agile Manifesto and the 12 Principles behind the Agile Manifesto" and "[t]he Agile Manifesto and the 12 Principles were written by a group of software developers (and a tester) to address issues that software developers faced."

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations."[5] Although the screenshots indicate that Agile Alliance promotes its software and principles, the Petitioner did not explain how this evidence demonstrates the professional status of the

[4] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).
[5] *See also* 6 *USCIS Policy Manual*, supra, at F.5(B)(2).

organization. The documentation does not show that Agile Alliance has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association consistent with this regulatory criterion.[6]

Because the Petitioner did not sufficiently establish that Agile Alliance qualifies as a professional association, we withdraw the Director's determination for this criterion.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F).

On appeal, the Petitioner's brief repeats his response to the Director's RFE and argues that his evidence "satisfied the applicable burden of proof, demonstrating by a preponderance of the evidence that [he] achieved such recognition and rendered vital contributions in his field." The record reflects that the Petitioner provided a letter from [redacted] project manager at [redacted], and an article from sun-sentinel.com, which indicate that [redacted] "was one of the 50 Brazilian companies chosen out of a total of 2,409 applicants . . . for [redacted] 'business accelerator' program" that "assist[s] the 50 Brazilian companies to launch U.S. operations, creating jobs in Florida and strengthening ties with the state's largest trade partner."

According to [redacted]

> Since [redacted] was chosen to participate of this program, [the Petitioner] was working diligently in order for the technology to pass all qualifications phases, and after showing his potential and commitment, the multi-billion dollar U.S. company, [redacted] entered in collaboration with [redacted] and its technology as a potential solution to help the U.S. market in automating businesses' sales processes, no matter their locations . . . .
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> [The Petitioner's] technology was considered by [redacted] as a strongly viable tool for bringing technology and services to remote parts of the U.S., even where no internet connection existed. Using [the Petitioner's] expertise in combination with the best technologies available, him and his team created a solution that continues to facilitate the ease and efficiency of business operations by helping to store all information into a local database even in small devices. This bringing security, high performance, and intelligence, all at the hands of many companies' managers and employees who need work remotely.

In addition, the Petitioner submitted a letter from [redacted] former employee of [redacted] who furthered described the Petitioner's [redacted]' as a "CRM [customer relationship management] platform that essentially speeds up and opens new doors to salespeople in any company using it." Furthermore, the Petitioner provided background information about [redacted], promotional material for [redacted], the [redacted] user manual, and a reseller agreement between [redacted] and [redacted]

[6] The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation."

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities or professional or business organizations."[7] [redacted] letter and article shows that [redacted] was selected for [redacted] s program rather than recognition of the Petitioner's achievements and significant contributions. Moreover, although the letters from [redacted] and [redacted] credit the Petitioner for developing [redacted], they do not further elaborate and sufficiently explain how [redacted] qualifies as a "significant contribution[] to the industry or field." Again, this regulatory criterion not only requires the Petitioner to demonstrate contributions to the industry or field but that those contributions be "significant." Here, the Petitioner did not establish the impact of [redacted] to the field rather than limited to [redacted]. Furthermore, while [redacted] indicated that [redacted] "evidently continues to be used," she did not articulate the influence of [redacted] to the field or industry to be considered a significant contribution.[8]

The Petitioner also referenced the letter from [redacted] discussed above, who opined that the Petitioner meets the criteria relating to official academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A), ten years of full-time experience at 8 C.F.R. § 204.5(k)(3)(ii)(B), and membership in professional associations at 8 C.F.R. § 204.5(k)(3)(ii)(E). [redacted] however, does not offer an opinion relating to this criterion. Regardless, while he summarized documentation presented to him by the Petitioner, [redacted] does not explain how the Petitioner has received recognition for his achievements and made significant contributions to the field or industry rather than repeating the Petitioner's employment history. [redacted] does not demonstrate that the Petitioner's work resulted in recognition for achievements and significant contributions.

Similarly, the Petitioner provided a letter from [redacted] computer engineer at [redacted] who indicated that he worked with the Petitioner for two years and described the duties performed, such as "he planned the software architecture and all the workflow of the sales web portal" and it "was of huge value because it made the company increase their business as well distribute and make mobile the sales process, improving its revenue." Moreover, the Petitioner referenced the previously discussed letter from [redacted] who stated that "[s]ince his start with our firm [redacted], he has already helped bolster the creativity and technical tact of our IT management team, which in turn has divulged his advice to supporting IT staff." Furthermore, the Petitioner submitted a letter from [redacted] who indicated that the Petitioner was "a professor at the [redacted] on a part time basis" and "[a]lthough he worked as a software engineer for [redacted], he still made his time available to teach and share with youth who dreamed of entering the computer science profession."

While the letters praise the Petitioner for his professional abilities, they do not indicate how he has been recognized for his achievements, nor do they explain how his contributions rise to the level of "significant" consistent with this regulation. The letters, for instance, do not show how his contributions have somehow impacted or influenced the field or industry in a significant manner beyond his employers. Without detailed, probative information, the letters do not sufficiently demonstrate his recognition for achievements and significant contributions to the industry or field.

For the reasons discussed above, the Petitioner did not establish that he satisfies the criterion.

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[7] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

[8] While the record also contains some customer reviews of [redacted] from [redacted]'s website, they do not reflect significant contributions to the field or industry.

III. CONCLUSION

The Petitioner has not established that he meets at least three of the criteria. As a result, we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification.[9] In addition, we need not reach a decision on whether, as a matter of discretion, he is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these issues.[10] The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[9] *See* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).
[10] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, n.7 (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).